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In The

Supreme Court of the United States

October Term, 1984

SPYRIDON KOLLIAS,

Petitioner,

vs.

BAY TANKERS, INC. and KINGSWAY TANKERS, INC.,

Respondents.

PETITION FOR WRIT OF CERITIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The Jones Act, 46 U.S.C. §688 and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* provide a comprehensive and remedial statutory scheme intended to protect all persons employed in the maritime industry. The 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act extended coverage of that Act to include adjacent shoreside areas in order to protect workers working at the water's edge. In 1982, the Second Circuit Court of Appeals, in an indemnification action brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act, held that the Longshoremen's and Harbor Workers' Compensation Act extended to the high seas. *See Cove Tankers v. United Ship Repair, Co.,* 683 F. 2d 38. In the instant case, the Second Circuit has applied that decision to a case brought under the Jones Act where a man worked aboard a vessel for the duration of a foreign voyage when that vessel was not only upon the high seas but in foreign territorial waters, thus raising the following questions:

1. Whether the pre-existing uniformity in the federal maritime law should be abrogated by the extension of coverage of the Longshoremen's and Harbor Workers' Compensation Act to the high seas and foreign territorial waters.

2. Whether extending coverage of the Longshoremen's and Harbor Workers' Compensation Act to the high seas and foreign territorial waters creates an unjust, harsh and inconsistent result in that persons doing the same work and subjected to the same risks aboard vessels on the high seas would no longer be granted the same statutory and general maritime law protection.

3. Whether the judicially created test for determining status as a seaman under the Jones Act should be undermined by the extension of coverage of the Longshoremen's and Harbor Workers' Compensation Act to the high seas and foreign territorial waters which creates an unwarranted confusion of a person's status with his function aboard a vessel.

4. If coverage under the Longshoremen's and Harbor Workers' Compensation Act does not extend to the high seas and foreign territorial waters, are there then "pockets of Sieracki seamen" who are still entitled to a warranty of seaworthiness as determined by the Fifth Circuit Court of Appeals' *Cormier v. Oceanic Contractors, Inc.*, 696 F. 2d 1112 (1983), *cert. denied*, 78 L. Ed. 2d 94.

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No.

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October Term, 1984

SPYRIDON KOLLIAS,

Petitioner,

vs.

BAY TANKERS, INC. and KINGSWAY TANKERS, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Spyridon Kollias, the petitioner herein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 24, 1984.

OPINIONS BELOW

1. The order of the United States Court of Appeals for the Second Circuit denying rehearing and rehearing *en banc,* dated and entered June 12, 1984, is printed in the Appendix hereto, *infra* at 1a. It is not officially reported.

2. The opinion and judgment of the United States Court of Appeals for the Second Circuit affirming the District Court order, dated and entered April 24, 1984 is printed in the Appendix hereto, *infra* at 3a. It is not officially reported.

3. The District Court order dated August 24, 1983 denying the motion for a new trial upon the grounds of newly discovered evidence is printed in the Appendix hereto, *infra* at 9a. It is not officially reported.

4. The District Court order dated July 21, 1983 denying the motion for judgment notwithstanding the verdict or for a new trial is printed in the Appendix hereto, *infra* at 10a. It is not officially reported.

5. The District Court order dated July 21, 1983 dismissing the complaint, together with the special verdict form, is printed in the Appendix hereto, *infra* at 6a. It is not officially reported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Second Circuit was made, entered and filed on April 24, 1984. A timely petition for rehearing or rehearing *en banc* was denied on June 12, 1984.

2. The time for filing this petition would ordinarily have expired within ninety days from June 12, 1984.

3. By order dated September 4, 1984, the Honorable Mr. Justice Thurgood Marshall, Circuit Judge for the Second Circuit granted an extension of time until October 10, 1984. This petition for certiorari is filed within that time.

4. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, §2 of the Constitution of the United States; the Jones Act (46 U.S.C. §688); Sections 903 and 905 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§901 *et seq.*); The High Seas and Inland Waters-Lines of Demarkation Act (94 Stat. 1020, Public Law 96-324, August 8, 1980); The Shipping Code, Title 46, §564 and §713 and revised Title 46 Part A, 2101(3), Part G pertaining to Merchant Seaman Protection and Relief and §§10101, 10301, and 10303, are printed in the Appendix hereto, *infra* at 11a-21a.

STATEMENT OF THE CASE

Petitioner Spyridon Kollias brought an action pursuant to the Jones Act, 46 U.S.C. §688 and general maritime law for personal injuries he suffered while working on ship's equipment aboard the TT Williamsburgh, en route from the Gulf of Mexico to the western coast of the United States around Cape Horn. At the time of his injury, the vessel was fifteen hundred miles on the high seas and in foreign territorial waters, en route to Curacao. Respondents Bay Tankers Inc., and Kingsway Tankers, Inc. denied Kollias' status as a seaman and a member of the crew employed by the vessel, contending that he was a ship repairman supplied by an independent contractor and that his sole remedy was under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.*

The District Court refused to decide Kollias' status as a matter of law. In charging the jury, the District Court placed the issue of Kollias' status in a framework predicated on its previous analysis of the maritime industry in *Cove Tankers v. United Ship Repair Co.*, 528 F. Supp. 101, *aff'd.*, 683 F. 2d 38 (1982). The court took the position ". . . that the location of the ship at the time of the accident is also not a determining factor with respect to plaintiff's status. A person can be a ship repairman or be a seaman regardless of whether the ship is then at sea or in port." (28a). The District Court refused to charge the jury as to the statutory definition of "seaman" and told the jury that the term needed no definition.

The adverse jury verdict and the District Court's subsequent denial of two post trial motions to set the verdict aside and direct a new trial upon the grounds of newly discovered evidence was affirmed by the Second Circuit. Because he was found to be a ship repairman under the Longshoremen's and Harbor Workers' Compensation Act, your petitioner filed for compensation benefits under that Act. The insurance carrier raised immediate objections before the Compensation Board on jurisdictional grounds since Kollias was injured on the high seas. At the present time, Kollias has received no benefits and no remedy under either the Jones Act or the Longshoremen's and Harbor Workers' Compensation Act.

It was uncontradicted during the trial of this case that the petitioner and five other men boarded the TT Williamsburgh on or about July 25, 1981 off Galveston, intending to make a foreign voyage around Cape Horn to the west coast of the United States. The Chief Engineer of the vessel expressly testified that he was told to keep these men working for the duration of the voyage and that he checked their work several times a day. During the first days on board ship, Kollias worked with other crew members, performing numerous tasks under the direction and supervision of ship's officers. Testimony during the trial of this case established that Kollias and the five other men supplied by D & G Ship Repair Company spent approximately 20% of their time repairing the starboard anchor windlass and the remainder of their time on other tasks involving the ship's equipment and maintenance work. All tools and equipment were supplied by the ship. Although the master of the vessel expressly denied that the petitioner was a member of his crew, Kollias was indeed listed as a member of the crew on a Customs List certified by the Master which was submitted to customs upon the ship's arrival at Curacao. This Customs List suggests that Kollias and the other men signed Articles when the voyage became a foreign voyage after the vessel diverted to Curacao to pick up a spot cargo. All copies of the ship's Articles have disappeared.

It was uncontradicted that Kollias was injured by the failure of a wrench, supplied by the vessel, which broke and struck Kollias in the head, causing severe and permanent injury. After his injury, Kollias was given medical treatment under the supervision of the

Master of the vessel, and when the ship arrived in the port of Curacao, he was taken to a Shell Oil Company doctor for medical treatment and was taken off duty for two weeks. He was also paid maintenance up until the time that the jury rendered its verdict.

It is your petitioner's position that the statutes of the United States and the general maritime law mandate that anyone who joins a vessel under the conditions set forth above, making a sixty-three day voyage covering 14,000 miles, must be considered an American seaman and member of the crew employed by the vessel. The issue before this Court is whether or not the extension of the Longshoremen's and Harbor Workers' Compensation Act to include the high seas and foreign territorial waters can be permitted so as to undermine and, indeed, obliterate the protections to which persons working on the high seas have been customarily afforded.

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's decision abrogates the uniformity essential to the application of federal maritime law and is contrary to the intent of Congress to provide comprehensive remedial legislation for merchant seamen and other maritime workers.

This Court has long been concerned with the correction of anomalies in a uniform body of federal maritime law, especially in personal injury cases, and specifically with aberrations hinging upon the geographic location of the tort or injury. This doctrine of uniformity in maritime law has its ultimate basis in the United States Constitution, Article III, Section 2, which extends the judicial power "to all cases of admiralty and maritime jurisdiction." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

In the case herein, the Second Circuit has violated the uniformity of federal maritime law, creating a conflict between the Jones Act, 46 U.S.C. §688 and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* as a result of its erroneous definition of the term "navigable waters of the United States" to include the high seas and foreign territorial waters. By its unwarranted interpretation of the Longshoremen's and Harbor Workers' Compensation Act, the Second Circuit has converted those who would hitherto have been deemed seamen into maritime employees ostensibly covered by the Longshoremen's and Harbor Workers' Compensation Act but who are actually outside the jurisdictional coverage of that Act. If, as the Second Circuit believes, the maritime industry has developed a practice of sub-contracting work aboard vessels on the high seas which was hitherto performed by traditional seamen, those workers, under the decision herein, will have no remedy for personal injury under the Jones Act, nor would they be entitled to the protections accorded by Congress to merchant seamen. *See Cove Tankers v. United Ship Repair,* 683 F. 2d 38 (1982). Such treatment of men who take the risks as other crew members creates an anomaly which is contrary to congressional intent and to judicial decision.

Further, unless this Court decides to the contrary, such men will not be entitled to compensation for injuries occurring on the high seas under the Longshoremen's and Harbor Workers' Compensation Act, since that Act extends coverage to only those working on the "navigable waters of the United States." 33 U.S.C. §903.

If in fact such workers are not "seamen," their coverage under the Longshoremen's and Harbor Workers' Compensation Act will depend on the fortuity of whether or not they are working on navigable waters of the United States or on the high seas. This result will encourage and promote circumvention by shipowners of the Longshoremen's and Harbor Workers' Compensation Act and the Jones Act and is contrary to the intent of Congress to provide a uniform system of coverage for all maritime workers. *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 267 (1979); *Jones & Laughlin Steel Corp. v. Pfeiffer,* 462 U.S. ____, 103 S. Ct. 254, 75 L. Ed. ____ (1983). To paraphrase this Court's ruling in *United Transportation Union v. Long Island Railroad,* 455 U.S. 678 (1982), to allow individual shipowners to circumvent the federal system governing maritime law and regulations of the maritime industry would destroy the uniformity thought essential by Congress and would endanger the efficient and safe operation of the shipping industry. Further, the Second Circuit's decision herein shows a complete disregard for the intent of Congress to provide pervasive remedial legislation for the maritime industry. This Court has long recognized that it is the duty of the Court to respect the will of Congress. As this Court has traditionally stated, "even in admiralty . . . where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress." *Northwest Airlines v. Transport Workers Union,* 451 U.S. 77 (1981); *Mobile Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978); *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.,* 342 U.S. 282 (1952); *Cooper Stevedoring Co. v. Fritz Kopke Inc.,* 417 U.S. 106 (1974).

It is submitted that it was not the intent of Congress to deprive a man intending to work on the high seas for the duration of a foreign voyage a remedy for personal injuries occurring as a result of his employment and to leave him in a twilight zone of ambiguity where he has no remedy whatsoever. The result herein

is directly attributable in the first place to the District Court's decision to ignore the jurisdictional boundaries of the Longshoremen's and Harbor Workers' Compensation Act, and the definition contained therein regarding covered employees and to erroneously instruct the jury that the situs of the vessel was irrelevant in deciding Kollias' status.

Despite the restriction of the definition of a "ship repairman" to a worker on the navigable waters of the United States, the District Court charged the jury as follows:

> "I believe I already told you that the location of the ship at the time of the accident is also not a determining factor with respect to plaintiff's status. *A person can be a ship repairman or be a seaman regardless of whether the ship is then at sea or in port.*" (Emphasis added.)

This instruction was given over the petitioner's objection since, we submit, it is totally contrary to law.

The District Court's refusal to define the term "seaman" for the jury or to charge the jury as to the statutory definition of seaman contained in 46 U.S.C. §713 was a further demonstration of the court's determination to mold the verdict so as to prevent Kollias and others from recovery under the Jones Act. The District Court's belief that Section 713 was modified by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act is totally erroneous and contrary to the intent of Congress. The recent revisions of Title 46, and indeed, the ongoing revisions, fully support Kollias' position that Section 713 was not modified by the 1972 amendments of the Longshoremen's and Harbor Workers' Compensation Act and that Section 713 is fully applicable to the Jones Act.[1]

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1. The legislative history of the recent revisions to Title 46 expressly state that Section 713, now Section 10101, defines the terms "master," "seaman" and "owner" as they apply to merchant seaman's protection and relief. H.R. No. 98-338, Appendix to revised Title 46, p. 192. The expansive definition of seaman is in keeping with the stated remedial purpose of the Act. Further, the legislative history indicates that Section 713 was found to be a prime example of an antiquated law and thus in need of substantial revision, implying certainly

(Cont'd)

Such an interpretation of the law is congruent with this Court's concern ". . . to define the meanings for the purpose of a particular statute which must be read in the light to be corrected and the end to be obtained." *Warner v. Goltra,* 293 U.S. 155 (1934); *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940). In this regard, the Second Circuit's decision to ignore the jurisdictional boundaries of the Longshoremen's and Harbor Workers' Compensation Act is contrary to the intent of Congress with respect to both the Longshoremen's and Harbor Workers' Compensation Act and the Shipping Code. The revisions to Title 46 expressly define "full boundary line" as is set forth in Title 33, Section 151 and make this definition expressly applicable to Title 46. *The legislative history of this Act demonstrates that Congress did not intend to include the high seas as part of the navigable waters of the United States.*[2]

(Cont'd)

that no previous revisions had taken place. Had the term "seaman" been previously modified so as to exclude persons like the petitioner, such modification would have been reflected in these substantial revisions to Section 713. There is absolutely no mention whatsoever in the legislative history of these revisions of any so-called custom of the industry to use "riding crew." There is total silence in the legislative history of these revisions regarding any change in the definition of seaman so as to exclude a person such as the petitioner. The bill was regarded as "*for the most part a restatement of the existing maritime safety and seamen protection laws administered by the Coast Guard*" (emphasis added). H.R. 98-338, Appendix to revised Title 46, p. 117. Lastly, the committee report accompanying these revisions expressly stated "the committee also feels as the Courts have held, that the literal language of the statute should control the disposition of the cases. There is no mandate in logic or in case law for relying on legislative history to reach a result contrary to the plain meaning of the statute, particularly where that plain meaning is in no way unreasonable." H.R. 98-338, 98th Congress, Appendix to revised Title 46, p. 120.

2. The "High Seas and Inland Water Lines of Demarkation Act", 33 U.S.C. §151 which was passed on August 8, 1980 specifically authorizes the Secretary to "divide the high seas from the harbors, rivers and other inland waters of the United States." The purpose of the Act as set forth in this legislative history is to "clarify the Coast Guard's authority to establish separate lines dividing the high seas and inland waters for determining the applicability of inland navigational rules and various marine safety laws," Senate Report 96-843, 96th Congress (1980). The lines dividing the high seas from the inland waters of the United States may not be more than 12 nautical miles of the base line from which the territorial sea is measured.

The Second Circuit's opinion that a worker injured fifteen hundred miles out on the high seas could be said to have been injured on the "navigable waters of the United States" should not be allowed to stand since it is clearly contrary to the intent of Congress as expressed in Title 33, Section 151 and Title 46 pertaining to merchant seaman safety and protection. Further, nothing in the legislative history of the Longshoremen's and Harbor Workers' Compensation Act and the 1972 amendments thereto indicates that Congress intended the navigable waters of the United States to encompass the high seas and foreign territorial waters. On the contrary, according to this Court's recent decision in *Director, Office of Worker's Compensation Programs v. Perini North River Associates,* 459 U.S ____, 103 S. Ct. 634, 79 L. Ed. 2d ____ (1983), one of the primary purposes of the amendments was to extend coverage of the Act to include certain land areas.[3] There is no mention whatsoever of congressional intent to extend the navigable waters of the United States to the high seas so as to cover alleged harbor workers working on the high seas or in foreign territorial waters.[4]

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3. In its lengthy analysis of the 1972 amendments and the history of the Longshoremen's and Harbor Workers' Compensation Act, this Court pointed specifically to the legislative history as follows: "Certain comments made in the preceding passage of the 1972 Amendments in the House indicate support for our view that *Congress intended to extend protection in 1972, and not to withdraw protection.*" For example, Representative Steiger posed the following question and answer to explain the coverage provision:

> "The present law covers employees working on navigable waters. Do the amendments change the scope of coverage? 'Answer: Yes' The present laws coverage is limited to employees working on navigable waters, including those working on dry dock. The amendment will extend coverage to wharves, terminals, marine railways and other adjoining areas. . ." 118 Cong. Rec. 36385 (1972). *See also,* 118 Cong. Rec. 36270-36271; *id.* at 36381-36382.

4. As this Court has stated on the silence of Congress: "This silence is most eloquent, for such reticence while contemplating an important and controversial change in the law is unlikely." *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 267 (1979).

The Second Circuit has created an unfair, anomalous and wholly unnecessary distinction between categories of people aboard vessels on the high seas who are subjected to similar risks. Policy, fairness and justice clearly evidence that such a result should be reversed by this Court.

II.

The decision in this case is in serious conflict with other Circuit Courts as to the definition of seamen and to the proper application of the Jones Act, 46 U.S.C. §688 and general maritime law to those working on board vessels in navigation who are jurisdictionally barred from compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Federal maritime law provides a pervasive scheme for the protection of merchant seamen under the Jones Act, 46 U.S.C. §688 and other federal statutes and regulations, and for the protection of other maritime workers and longshoremen under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* These statutes were intended to be mutually exclusive and have previously been construed together to provide uniform coverage for all maritime workers. Prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, longshoremen were entitled to recover under the general maritime doctrine of unseaworthiness. While those amendments eliminated the remedy of unseaworthiness, they extended the landward scope of the Longshoremen's and Harbor Workers' Compensation Act in order to include additional maritime workers who had previously been denied coverage.

Prior to this case, the Second Circuit had consistently held that "*the remedies afforded by the Jones Act and maintenance and cure are designed to protect those who perform services upon ships and are exposed to the unique hazards of work upon the sea.*" *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (1973). *See also, Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *The Falco*, 20 F. 2d 363 (2d Cir. 1927); Gilmore and Black, *Law of Admirality*, 2d Ed. Sections 6-20 *et seq.* (1975). It is precisely the risk of exposure to the hazards of the sea including the vessel's equipment, which has been among the critical factors of determining status as a seaman and member of the crew, irrespective of a person's function aboard the vessel.

The decision of the Second Circuit in this case, affirming an adverse jury verdict below, is contrary to its prior decisions

and seriously undermines and is in conflict with the decisions of this Court, other Circuit Courts of Appeal, congressional authority, and indeed encourages and promotes avoidance by shipowners of statutory remedies accorded to seamen, so as to deprive men working aboard vessels on the high seas from remedies under statutory authority and general maritime law.[5]

The decision clearly conflicts with other Circuits on several grounds. The court maintained that the questions of seamen status was a question of fact for the jury and could not be set aside. It is, however, well established that in a clear case, the issue of status must be determined as a matter of law, and that a jury verdict may be set aside if it is contrary to the evidence. *Landry v. Amoco Production Co.*, 595 F. 2d 1070 (5th Cir. 1979); *Bertrand v. International Mooring & Marine*, 700 F. 2d 240 (5th Cir. 1983); *Sojak v. Hudson Waterways Corp.*, 590 F. 2d 53 (2nd Cir. 1978).[6]

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5. Revised 46 U.S.C. §§10301 *et seq.* sets forth the statutory protections accorded to merchant seamen including, but not limited to the requirement that Shipping Articles be signed, standards for accommodations, medicine, wages, advances. These statutory requirements are enforced by the United States Coast Guard.

6. It is well-settled that where the record demonstrates that reasonable persons could not draw conflicting inferences, the court shall direct the verdict as a matter of law. Thus, in *Landry v. Amoco Production Co.*, 595 F. 2d 1070 (1979), the Fifth Circuit held that a Jones Act claimant, hired on a probationary status as a roustabout, having no seaman's papers, was a seaman as a matter of law since she spent a substantial period of her time (70%) in "vessel-related" work activities. The Circuit Court in the same case (p. 1074) held:

> "The proper legal standard coupled with undisputed facts showing plaintiff's substantial work relating to vessels in navigation makes clear that reasonable persons could not conclude that Ms. Landry was not a seaman."

Likewise, in *Bertrand v. International Mooring and Marine Inc.*, 700 F. 2d 240 at 246 (1983) the Fifth Circuit held that the plaintiff, a member of an anchor handling crew which ate and slept aboard the vessel for the duration of the mission which lasted seven days, was a seaman and member of the crew as a matter of law. The court believed that the undisputed facts revealed that the anchor handling crew worked on 25 vessels and that approximately 90% of the work was performed aboard the vessels, thereby satisfying the substantial work test of the *Robison* case.

(Cont'd)

Further, the issue of employment was one which should have been decided as a matter of law. Not only was there uncontradicted testimony that Kollias' work was directed by the ship's officers, it is contrary to maritime law and practice that anyone other than the Master of the vessel have authority aboard that vessel when it is upon the seas.

The Second Circuit's refusal to consider whether an employment relationship (either direct or as a borrowed servant) existed as a matter of law is in clear conflict with decisions of the Fifth, Seventh and Ninth Circuits. *See Gaudet v. Exxon Corp.*, 562 F. 2d 351 (5th Cir. 1972); *Gudgel v. Southern Shippers, Inc.*, 387 F. 2d 723 (7th Cir. 1963); *McCollum v. Smith*, 339 F. 2d 348 (9th Cir. 1964).[7]

As a result of the Second Circuit's decision herein, there is a substantial injustice to persons working on the high seas who are subjected to the unique risks associated with being at sea, but who will be deprived of coverage under the Jones Act and other maritime laws should they bring suit in the Second Circuit.

(Cont'd)

The facts in the instant case are uncontradicted. Kollias joined the TT Williamsburgh offshore in the Gulf of Mexico. He worked on board for several days prior to sailing and then sailed with the ship. He was injured 1500 miles out at sea while the vessel was bound for Curacao to pick up a spot cargo, because of the failure of a piece of ship's equipment, a giant wrench, while under the supervision of ship's officers. The Chief Engineer testified that he was told to keep Kollias and the others working throughout the duration of the voyage and further testified that he looked over their work several times a day, but destroyed his work records on a daily basis. *There are no factual disputes in the case in regard to the manner he was injured, or how he was injured, nor is there any dispute as to the location of the vessel at the time of the injury.*

7. This Court has held that control is the most universally accepted standard for establishing an employer-employee relationship. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S. Ct. 1373, 93 L. Ed. 1692 (1949); *United States v. W. M. Webb Inc.*, 397 U.S. 179, 90 S. Ct. 850, 25 L. Ed. 2d 207 (1970). Kollias was employed by the respondent shipowners Bay Tankers and Kingsway Tankers either directly or as a borrowed servant in that he was under the complete control of the master of a vessel, on the high seas, for the duration of a foreign voyage. The jury verdict was contrary to law and contrary to the weight of the evidence. Kollias contends that this crucial issue ought to have been decided as a matter of law by the District Court since there is ample precedent for so doing.

The case represents a serious departure from a tripartite test for determining seamen status in the landmark decision of *Offshore Co. v. Robison,* 266 F. 2d 2769 (5th Cir. 1959) *by extinguishing the requirement that a worker aboard a vessel in navigation, more or less permanently assigned to that vessel and contributing to that vessel's mission be found a seaman for purposes of the Jones Act.*[8] Further, the decision is in sharp conflict with the Fifth Circuit regarding those who are not "traditional" seamen but are jurisdictionally barred from compensation under the Longshoremen's and Harbor Workers' Compensation Act. In *Aparicio v. Swan Lake,* 643 F. 2d 1109 (1981) the Fifth Circuit held that workers *not* covered by the Longshoremen's and Harbor Workers' Compensation Act may invoke a Sieracki unseaworthiness remedy against the vessel owner. In a subsequent decision which this Court has let stand, the Fifth Circuit applied its decision in *Aparicio* to workers not covered by the Longshoremen's and Harbor Workers' Compensation Act because they worked in a foreign country, stating that there are "pockets of Sieracki seamen" who remain entitled to a warranty of unseaworthiness. *Cormier v. Oceanic Contractors, Inc.,* 696 F. 2d 1112 (1983), *cert. denied,* 78 L. Ed. 2d 94 (October 4, 1983).

The decision in this case is in further conflict with decisions in both the Fifth and First Circuits regarding attempts by shipowners to avoid the Jones Act and other remedial federal legislation. Thus, in holding that employees of catering and cleaning service who lived aboard the vessel were crew members and therefore entitled to a lien for crews' wages, the Fifth Circuit has twice stated: "*We are concerned lest those laboring aboard ship lose their traditional protection where shipowners procure seaman's services through independent contractors.*" *International Paint Co. v. M/V Mission Viking,* 637 F. 2d 383 at p. 385 (5th Cir. 1981); *G.E. Credit Leasing v. Drillship Mission Exploration,* 668 F. 2d 811 (5th Cir. 1982). (Emphasis added.) The First Circuit has likewise reaffirmed the special solicitude of the court for the

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8. The three-pronged test enunciated by the Fifth Circuit in *Offshore Co. v. Robison,* 266 F. 2d 769 (1959) requires that (a) the vessel must be in navigation; (b) the plaintiff must have a more or less permanent connection with the vessel; (c) he must be aboard the vessel to contribute to the function of the vessel or the accomplishment of its mission.

care and safety of seamen and those doing seaman's work. In *Austin v. Unarco Industries, Inc.*, 705 F. 2d 1 at p. 12 (1983), the First Circuit stated: "*A second, and perhaps more immediately pertinent observation is that the policy protects not only seamen but, by judicially created extension, those who are serving the same function as seamen would serve: otherwise a vessel owner might be able to frustrate the policy by sub-contracting chunks of a seaman's job to others.*" The frustration of federal policy will certainly be the result if the decision in this case is allowed to stand. In the instant case, the District Court refused to give any instruction on either unseaworthiness or breach of warranty despite the fact that Kollias was provided all his tools by the vessel, and was injured by the failure of a ship's wrench. He was working on the high seas and in foreign territorial waters for a period of sixty-three days.

The deprivation of a remedy which he would have received in another Circuit Court is attributable directly to the Second Circuit's decision to expand the scope and intent of its holding in *Cove Tankers v. United Ship Repair,* 683 F. 2d 38 (1982).[9] In that case, the Second Circuit expressly ruled that its holding was a narrow one, limited to the facts of the case, and held that the navigable waters of the United States extended to the high

9. Unlike the case herein, *Cove Tankers Corp. v. United Ship Repair* was brought specifically under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* There was no question of any claim by an injured employee since the claims of the injured employee and next of kin of the deceased employee had been settled previously. Specifically, *Cove Tankers* involved a suit for indemnification by the shipowner from the employer for the amount he had paid in settlement of claims. The shipowner argued that the high seas were not "navigable waters of the United States and that he was not barred from recovery." At the time the employees were injured, the vessel was moving from one United States port (Philadelphia) to another (New York) with no deviation, scheduled or otherwise, into the foreign territorial waters of any foreign nation. However, there was an unscheduled deviation onto the high seas 100 miles offshore. On those facts, the Second Circuit upheld the District Court's decision that the navigable waters of the United States included the high seas, noting first "that the action in the District Court was brought by the shipowner for indemnification, not by the injured employee." *Cove Tankers, supra,* p. 41. Reasoning that shipowners could by mere course deviate into waters beyond a territorial limit, and prevent employees from receiving the Act's benefits, the Second Circuit ruled that under the narrow facts of that case the navigable waters of the United States included the high seas.

seas. The Second Circuit, citing this Court's decision in *Pfeiffer v. Ford,* 444 U.S. 69 (1979), reasoned that such extension would prevent shipowners from frustrating the uniform standard of coverage under the Longshoremen's and Harbor Workers' Compensation Act and would prevent harbor workers from going in and out of coverage.

By affirming the verdict below in this case, however, the Second Circuit has ruled that the Longshoremen's and Harbor Workers' Compensation Act covers the high seas and foreign territorial waters. The result of this decision is to so confuse a person's "function" aboard a vessel with a person's status as a seaman that non-traditional seamen will be deprived from coverage under the Jones Act and other federal legislation, creating a twilight zone wherein such persons will be denied any remedy whatsoever. This result is totally contrary to the intent of Congress and to the opinions of this Court and deliberately thwarts the remedial purpose of both the Longshoremen's and Harbor Workers' Compensation Act, the Jones Act and general maritime law.

III.

Federal maritime law has historically and consistently given a broad construction to the term "seamen" from which the decision of the Second Circuit represents a serious, unwarranted and threatening departure.

This Court is now faced with the issue of whether a man working aboard a vessel on the high seas and in foreign territorial waters should be deprived of seaman's status on the erroneous theory that he was merely a "ship repairman" who should be relegated to compensation under the Longshoremen and Harbor Workers Compensation Act, presuming eligibility under that statute.

The adverse jury verdict below was the direct result of the District Court's erroneous instruction to the jury that a man serving on board a vessel in navigation on the high seas could be either a "seaman" or a "ship repairman." In so charging, the District Court eliminated the well-established requirements of the Longshoremen's and Harbor Workers' Compensation Act since the statutory definition of "ship repairman" under that Act is jurisdictionally limited to those who work on the navigable waters of the United States.[10] The decision is thus totally contrary to this Court's ruling in *Director, Office of Worker's Compensation v. Perini North River Associates, supra,* "that a recognition that a worker's performance of his duties upon actual *navigable waters* is necessarily a very important factor in determining employment status." *Unless this Court determines that the navigable waters of the United States covers the high seas of the world and the navigable waters of foreign nations, there can be no legal justification for the District Court's charge and such a conclusion.*

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10. 29 C.F.R. §1915.4(d) defines "employee" as:

> "Any person engaged in ship repairing, shipbuilding, shipbreaking or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to repair any vessel under 18 net tons."

The District Court's refusal to charge the jury on the statutory definition of seamen, 46 U.S.C. §713 (now Section 10101), was directly due to the District Court's determination to maintain sustain and expands its decision in *Cove Tankers v. United Ship Repair,* 528 F. Supp. 101 (1982), *aff'd,* 683 F. 2d 38 (1982) holding that the navigable waters of the United States extended to the high seas. The trial judge's conduct during his charge to the jury amply demonstrates this contention and sustains it. Having stated all other jury instructions from the bench, he chose to stand and address the jury in the manner of an expert witness. Contrary to the agreed charges of court and counsel, the trial judge stepped down from the bench and walked over to the jury box and instructed them on so-called "riding crew practice" about which there had been not one iota of testimony in the record. In so doing, he demonstrated his intention of so controlling the jury as to mandate its finding that the petitioner was not a seaman and a member of the crew of the TT Williamsburgh.[11] The result was the abrogation of two hundred years of judicial decision as to the definition and status of a seaman.

Historically, the courts deemed those to be seamen who ". . . at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage." *Black v. The Louisiana,* F. Case #1461 (D.C. Pa. 1804), *cited in* Norris, *The Law of Seamen,* Volume I, Section 2; *The Buena Ventura,* 243 F. 797 (N.Y. 1916). The keystone opinion of Justice Story in *Harden v. Gordon,* 11 F. Case 480 (#6047) (M.E. 1823) insured a policy in the federal course of liberal and humanitarian interest in the welfare of seamen who are regarded as wards in admirality. *See* Norris, Comment, *Shipowner or Concessionaire as Jones Act Employer,"* Brooklyn Law Review, Spring, 1974, 881 *et seq.;* Gilmore and Black, *Law of Admiralty,* 2d Ed., Chapter 6 (1975).

More than 100 years ago, a federal court held that a fisherman was entitled to a lien for wages on the principle that "all hands

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11. It is well-settled that a trial court is "not permitted to add to the facts, or to present his own theories when they are not strongly grounded in the evidence." *Quercia v. United States,* 289 U.S. 466 (1933); *Ah Loukoa v. American Export Isbrandtsen Lines,* 513 F. 2d 261 (2d Cir. 1975); *Anderson v. Great Lakes Dredge & Dock Co.,* 509 F. 2d 1119 (2d Cir. 1974).

employed on a vessel . . . are entitled to a lien if their services are in furtherance of a main project of the enterprise in which she is engaged." *The Minna,* 11 F. 759 (1882). Similarly, in 1910, Judge Learned Hand held that a bartender was a seaman and entitled to a lien for ship's wages. There was "no reason why there should be an artificial limitation of rights to those engaged in the navigation of the ship, to the exclusion of others who equally further the purposes of her voyage . . . ." *The Mount Desert,* 175 F. 314 (1910). Historically, the remedies and special protections afforded to seamen and crew members have been given to clerks, carpenters, maids and cooks, even without the requirement that they perform actual seaman's duties such as those performed by Spyridon Kollias aboard the TT Williamsburgh.[12] As Judge Hough pointed out in the oft-cited *Buena Ventura:* "As the necessities of ships increased, so the word seamen enlarged its meaning." *Supra* at 799.

The terms seaman and member of the crew has been used interchangeably since as early as 1927 by Judge Learned Hand in *The Falco,* 20 F. 2d 363, and, indeed, those terms are so used today. Gilmore and Black, *The Law of Admiralty,* 2d Ed., Chapter 6 (1975).

The passage of the Jones Act, 46 U.S.C. §688 in 1920 was intended by Congress to enlarge and codify the existing rights of seamen by allowing them to sue their employers in negligence. *Salgado v. M.J. Rudolph Corp.,* 514 F. 2d 750 (2d Cir. 1975); Gilmore and Black, *The Law of Admiralty,* 2d Ed. 6-3, 6-20 (1975).

It has long been the policy of this Court to liberally interpret the definition of "seamen" so as to conform with the protective and remedial purpose of the Jones Act and other federal

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12. Although ostensibly hired with five other men to repair the starboard anchor windlass, there was uncontradicted testimony that these men spent only approximately 20% of their time on this task during a sixty-three day foreign voyage. There was ample uncontradicted testimony that they performed other tasks traditionally performed by crew members such as changing over the lube oil prior to sailing, repairing ship's equipment, working on the inert gas system, and working on the ship's cherry pickers. All tools and equipment were supplied by the ship.

legislation. As Justice Cardozo stated in a post-Longshoremen's and Harbor Workers' Compensation Act opinion, "in the enforcement of the statute (the Jones Act) a policy of liberal construction announced at the beginning has been steadily maintained." *Warner v. Goltra,* 293 U.S. 155 (1934). Justice Cardozo read the Jones Act together with Section 713 of Title 46, noting Justice Holmes' earlier dicta that Section 713 is "directed to extension, not to restriction." *Uravic v. F. Jarka Co.,* 282 U.S. 284 (1930).

The District Court's belief that Section 713 was modified by the passage of the Longshoremen's and Harbor Workers' Compensation Act is totally erroneous and is completely contradicted by the decisions of this Court. Speaking of the exclusion of crew members from the Longshoremen's and Harbor Workers' Compensation Act, Justice Cardozo stated "there is little doubt that Congress did this in the belief under the statutes then in force that master and crew alike were already adequately protected in case of injury or death. The belief had a sound foundation in the Act of 1920." *Warner v. Goltra, supra* at 156. The most recent revisions of Title 46 supports the view that Section 713 is directly applicable to the Jones Act.

Further, this Court has continually supported a broad construction of the terms "seamen" and "member of the crew" as embracing those on board the vessel "to aid in her navigation." *South Chicago Coal and Dock Co. v. Bassett,* 309 U.S. 251 (1940) and has construed the term "navigation" as *not limited* to those putting over the helm, but also embracing those whose duties are essential for other purposes of the vessel. *Norton v. Warner,* 321 U.S. 565 (1944); *Senko v. LaCross Dredging Co.,* 352 U.S. 370 (1957). As one leading commentator stated "it seems clearly never to have been questioned that any member of the ship's company who actually goes to sea, no matter what his or her duties may be, is a seaman." Gilmore and Black, *The Law of Admiralty,* 2d Ed. Sections 6-21 (1975). This proposition has been supported by other leading commentators: "Everyone is entitled to the privileges of a seaman who like seamen at all times contributes to and labor about the operation and welfare of the ship when she is upon a voyage and the term 'crew' must have at least as

broad a meaning under the Longshoremen's and Harbor Workers' Compensation Act." Benedict, *On Admiralty,* Volume IA, 7th Ed. Section 21 at 2-15 (1981).

The vast majority of cases dealing with the issue of seamen status have involved workers at the water's edge, often working on non-traditional vessels such as offshore rigs. *See* Edelman, *The Unusual Crew Member,* New York Law Journal, June 4, 1982; Fallon, *The Test of Seaman Status,* Tulane Law Review, Vol. 55, 1010-1028 (1981). Such workers have been liberally treated by this Court in regard to their legal status. In *Texas Co. v. Gianfula,* 350 U.S. 879 (1955), this Court held that a roustabout killed on a movable drilling rig was a Jones Act seaman. In *Senko v. LaCross, supra,* a laborer employed on a dredge was given seaman's status.

Certainly a man who worked aboard and was associated with a vessel for a period of sixty-three days on a foreign voyage, and who worked under the instructions and directions of ship's officers in order to aid in the vessel's navigation and operation, became intergrated with the entire crew and must be deemed to be a seaman and crew member employed by the respondents.

CONCLUSION

In view of these considerations, the petitioner respectfully submits that this petition be granted.

Respectfully submitted,

BERNARD ROLNICK
Attorney for Petitioner
Counsel of Record

PETER J. DEAN
JANE R. GOLDBERG
GERALD P. GOLDSMITH
Of Counsel

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of May one thousand nine hundred and eighty-four.

Filed June 12, 1984

No. 83-7747

SPYRIDON KOLLIAS,

Plaintiff-Appellant,

v.

BAY TANKERS, INC., WILMINGTON TRUST COMPANY, KINGSWAY TANKERS, INC., COVE SHIPPING CO., INC., GENERAL ELECTRIC CREDIT CORPORATION, and D. & G. MARINE SHIP REPAIR COMPANY (D. & G. MARINE SERVICE, INC.),

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Spyridon Kollias,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of April, one thousand nine hundred and eighty-four.

Filed Apr. 24, 1984

83-7747

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE THOMAS J. MESKILL,

HONORABLE JON O. NEWMAN,

Circuit Judges.

SPYRIDON KOLLIAS,

Plaintiff-Appellant,

-against-

BAY TANKERS, INC. and KINGSWAY TANKERS, INC.,

Defendants-Appellees.

Opinion

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and orders of said District Court be and they hereby are affirmed.

1. Appellant argues he is a "seaman" as a matter of law. This claim is without merit. Kollias ignores the existence of the mutually exclusive remedies provided by the Jones Act, 46 U.S.C. §688, and the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* The question whether a person is a seaman or crew member, 33 U.S.C. §902(3), is one "of fact, or a mixed question of fact and law. The jury exercises as much latitude on this question as it does on the question of negligence," *Harney v. William M. Moore Building Corp.*, 359 F.2d 649, 654 (2d Cir. 1966).

2. Kollias also insists the evidence did not support a factual finding that he was a ship repairman and not a crew member. This assertion is also to no avail. There were evidentiary facts on which the jury might have based its finding that he was a repairman: Kollias had a history of working as a repairman; Captain Moore testified Kollias was not a crew member; Kollias's tasks aboard the TT WILLIAMSBURG were repairs to equipment and work necessarily incident to those repairs. Consequently, the jury's finding was not clearly erroneous and must be sustained on appeal. *Bernardo v. Bethlehem Steel Company,* 314 F.2d 604, 608 (2d Cir. 1963).

3. Appellant argues he was an employee of appellees as a matter of law. This claim is meritless. Whether an employer-employee relationship exists is for the jury and turns in large part, as Judge Sand instructed, on the right of control over appellant.

Savard v. Marine Contracting Inc., 471 F.2d 536, 541 (2d Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). It was the jury's function to resolve the conflicting evidence on this issue. *Bernardo v. Bethlehem Steel Company, supra.*

4. Kollias's claims concerning appellees' negligence are also without merit. His arguments ignore the 1972 amendments to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §905(b), which eliminated a claim under that Act for unseaworthiness. Questions of negligence pursuant to 33 U.S.C. §905(b) are to be "resolved through the 'application of accepted principles of tort law and the ordinary process of litigation,' " *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165-66.

5. Appellant's other arguments are similarly meritless.

6. Accordingly, the judgment and orders are affirmed.

s/ Irving R. Kaufman
IRVING R. KAUFMAN

s/ Thomas J. Meskill
THOMAS J. MESKILL

s/ Jon O. Newman
JON O. NEWMAN
Circuit Judges.

JUDGMENT OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 CIVIL 4376 LBS

SPYRIDON KOLLIAS

Plaintiff

-against-

BAY TANKERS, INC.
KINGSWAY TANKERS, INC.

Defendants

The issues in the above entitled action having been brought on for trial before the Honorable Leonard B. Sand, U.S.D.J. and a jury on June 20, 1983; and during the trial the plaintiff having withdrawn his claims against defendants Wilmington Trust Co., Cove Shipping Co. and General Electric Corp.; and the Court having granted plaintiff's motion to dismiss as to defendant B & G Ship Repair [sic, should be D & G]; and at the conclusion of the trial the jury having answered the attached "Special Verdict Form" and the jury in so doing having returned a verdict in favor of the remaining defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

s/ Raymond Burghardt
Clerk

DATED: NEW YORK, N.Y.

July 21, 1983

APPROVED:

s/ Leonard G. Sand
U.S.D.J.

Judgment

SPECIAL VERDICT FORM

In re *Kollias:*

1. We the jury find that plaintiff Spyridon Kollias' status aboard the Williamsburg was that of:

A) A seaman and member of the crew, _____

B) A maritime repairman, not a member of the crew; x

2. We the jury find that at the time of the accident, the plaintiff was:

A) An employee of defendants, Bay Tankers, Inc. and/or Kingsway Tankers, Inc. _____

B) An employee of D & G Marine and not of defendants. x

June 28, 1983
s/ Kathleen Pagliaro

Judgment

WE, THE JURY, FIND:

A) That the defendants were negligent, and that this negligence was a proximate cause of plaintiff's injury.

Yes _____ No __x__

If you answered "Yes" to A, please answer the following:

B) That the plaintiff was himself negligent and that plaintiff's negligence was a proximate cause of his injuries.

Yes _____ No _____

C) If you answered B "Yes," by what percentage did plaintiff's own negligence contribute to his injuries?

Negligence of plaintiff _____%

Negligence of defendants _____%

TOTAL 100%

D) The damages which plaintiff shall recover are as follows:

1. Future medical expenses $_____
2. Past pain and suffering $_____
3. Future pain and suffering $_____
4. Past loss of earnings $_____
5. Future loss of earnings $_____

June 29, 1983
s/ Kathleen Pagliaro

MEMORANDUM ENDORSEMENT OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 24, 1983

Judge Sand
82 Civil 4376

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPYRIDON KOLLIAS,

Plaintiff,

-against-

BAY TANKERS, INC., WILMINGTON TRUST COMPANY, KINGSWAY TANKERS, INC., COVE SHIPPING CO., INC., GENERAL ELECTRIC CREDIT CORPORATION, AND D. & G. MARINE SHIP REPAIR COMPANY D. & G. MARINE SERVICE, INC.,

Defendants.

NOTICE OF MOTION AND AFFIDAVIT

MEMO ENDORSED 8/24/83

Motion denied.

So ordered.

s/ Leonard G. Sand
U.S.D.J.

Filed Aug. 25, 1983

MEMORANDUM ENDORSEMENT OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 21, 1983

Spyridon Kollias v. Bay Tankers, Inc., et al., 81 Civ. 4376 (LBS)

Upon consideration of the affidavits, exhibits and memoranda submitted by the parties, and viewing the evidence in the light most favorable to the defendant, we find the verdict reasonably supported by the evidence presented at trial. *See H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 940-41 (2d Cir. 1981), *cert. denied,* 103 S. Ct. 176 (1982).

The testimony of the witnesses and the exhibits introduced at trial support the reasonable conclusion that the plaintiff was a maritime repairman and not a crewmember aboard the TT Williamsburg, and that his injuries were not a result of negligence on the part of the defendants Bay Tankers, Inc. or Kingsway Tankers, Inc. The jury was properly instructed as to the law applicable to determining plaintiff's status on board ship, as well as the law of negligence and causation to be applied in a personal injury negligence action brought by a maritime worker against a vessel owner under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). We find plaintiff's other contentions to be without merit.

Accordingly, the motion for judgment notwithstanding the verdict or for a new trial is hereby denied. The Court will enter judgment forthwith dismissing the complaint.

So Ordered.

Dated: New York, New York

July 21, 1983

s/ Leonard B. Sand
U.S.D.J.

Received
Jul. 25, 1983
Bernard Rolnick

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Constitution, Article III, Section 2:

"Section 2, Clause 1. Jurisdiction of Courts

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The Jones Act, 46 U.S.C. §688:

"§688. Recovery for injury to or death of seaman

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall

be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007."

46 U.S.C. §713:

"§713. Definitions, schedule, and tables

In the construction of title 53 of the Revised Statutes, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of such title may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

Revised 46 U.S.C. §10101:

"§10101. Definitions

In this part—

(1) 'master' means the individual having command of a vessel owned by a citizen of the United States.

(2) 'owner' means the person to whom the vessel belongs.

(3) 'seaman' means an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel owned by a citizen of the United States."

46 U.S.C. §564:

"§564. Shipping articles

The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.

Second. The number and description of the crew, specifying their respective employments.

Third. The time at which each seaman is to be on board, to begin work.

Fourth. The capacity in which each seaman is to serve.

Fifth. The amount of wages which each seaman is to receive.

Sixth. A scale of the provisions which are to be furnished to each seaman.

Seventh. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which may be sanctioned by Congress or authorized by the Commandant of the Coast Guard not contrary to or not otherwise provided for by law, which the parties agree to adopt.

Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law. R.S. §4511; Mar. 3, 1897, c. 389, §19, 29 Stat. 691; Feb. 14, 1903, c. 552, §10, 32 Stat. 829; Mar. 4, 1913, c. 141, §1, 37 Stat. 736; 1946 Reorg. Plan No. 3, §§101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097."

Revised 46 U.S.C. §§10301, 10302, Application and Shipping Articles:

"§10301. Application

(a) Except as otherwise specifically provided, this chapter applies to a vessel of the United States—

(1) on a voyage between a port in the United States and a port in a foreign country (except a port in Canada, Mexico, or the West Indies); or

(2) of at least 75 gross tons on a voyage between a port of the United States on the Atlantic Ocean and a port of the United States on the Pacific Ocean.

(b) This chapter does not apply to a vessel on which the seamen are entitled by custom or agreement to share in the profit or result of a voyage.

(c) Unless otherwise provided, this chapter does not apply to a foreign vessel.

§10302. Shipping articles agreements

(a) Before proceeding on a voyage, the master of a vessel to which this chapter applies shall make a shipping articles agreement in writing with each seaman in the crew.

(b) The agreement shall contain the following:

(1) the nature, and, as far as practicable, the duration of the intended voyage, and the port or country in which the voyage is to end.

(2) the number and description of the crew and the capacity in which each seaman is to be engaged.

(3) the time at which each seaman is to be on board to begin work.

(4) the amount of wages each seaman is to receive.

(5) regulations about conduct on board, and information on fines, short allowance of

provisions, and other punishment for misconduct provided by law.

(6) a scale of the provisions that are to be provided each seaman.

(7) any stipulation in reference to advances and allotments of wages.

(8) other matters not contrary to law."

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.:

"§903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication

of the employee or by the wilful intention of the employee to injure or kill himself or another. Mar. 4, 1927, c. 509, §3, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, §§2(c), 21, 86 Stat. 1251, 1265."

§905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused

by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. Mar. 4, 1927, c. 509, §5, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, §18(a), 86 Stat. 1263."

Revised 46 U.S.C. §2101(3). Definitions:

"(3) 'Boundary Line' means a line established under section 2(b) of the Act of February 19, 1895 (33 U.S.C. 151).

Section 2101(3) defines 'boundary line' for the establishment of jurisdictional parameters for various maritime safety laws. Public Law 96-324, codified at 33 U.S.C. 151, permits the Secretary to establish appropriate identifiable lines dividing inland waters of the U.S. from the high seas for the purpose of determining the applicability of these laws. These laws will now be included within subtitle II of title 46—Shipping. These lines may not be located more than twelve nautical miles seaward of the baseline from which the territorial sea is measured and may differ in position for the purposes of different parts or sections of subtitle II."

PUBLIC LAW 96-324 [H.R. 1198]; August 8, 1980

Relevant Statutory and Constitutional Provisions

HIGH SEAS AND INLAND WATERS—LINES OF DEMARCATION

For Legislative History of this and other Laws, see Table 1, Public Laws and Legislative History, at end of final volume

An Act to clarify the authority to establish lines of demarcation dividing the high seas and inland waters.

High seas and inland waters demarcation lines

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That section 2 of the Act of February 19, 1895 (28 Stat. 672), as amended (33 U.S.C. 151), is amended to read as follows:

"SEC. 2.(a) The Secretary of the department in which the Coast Guard is operating shall establish appropriate identifiable demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States, for the purpose of determining the applicability of special navigational rules in lieu of the International Regulations for Preventing Collisions at Sea.

"(b) The Secretary shall also establish appropriate identifiable lines dividing inland waters of the United States from the high seas for the purpose of determining the applicability of each statute that refers to this section or this section, as amended. These lines may not be located more than twelve nautical miles seaward of the base line from which the territorial sea is measured. These lines may differ in position for the purposes of different statutes.

"United States"

"(c) For the purposes of this section, the term 'United States' includes the

several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other Commonwealth, territory, or possession of the United States."

SEC. 2. Section 10 of the Act of May 28, 1908 (35 Stat. 428), as amended (46 U.S.C. 395), is further amended by adding a new subsection to read as follows:

Seagoing barge

"(d) A seagoing barge means a barge which in the usual course of its employment proceeds outside the line dividing the inland waters from the high seas, as defined in section 2 of the Act of February 19, 1895 (28 Stat. 672), as amended (33 U.S.C. 151)."

Approved August 8, 1980.

LEGISLATIVE HISTORY

P.L. 96-324

HIGH SEAS AND INLAND WATERS—
LINES OF DEMARCATION

P.L. 96-324, see page 94 Stat. 1020

House Report (Merchant Marine and Fisheries Committee)
No. 96-427, Sept. 13, 1979 [To accompany H.R. 1198]

Senate Report (Commerce, Science, and Transportation Committee)
No. 96-853, July 16, 1980 [To accompany H.R. 1198]

Relevant Statutory and Constitutional Provisions

Cong. Record Vol. 125 (1979)

Cong. Record Vol. 126 (1980)

DATES OF CONSIDERATION AND PASSAGE

House September 17, 1979

Senate July 24, 1980

The Senate Report is set out.

SENATE REPORT NO. 96-853

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (H.R. 1198) to clarify the authority to establish lines of demarcation dividing the high seas and inland waters, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to clarify the Coast Guard's authority to establish separate lines dividing the high seas and inland waters for determining the applicability of inland navigational rules and various marine safety laws.

RELEVANT PORTIONS OF CHARGE TO THE JURY

Commencing at page [876]

* * *

The plaintiff, Spyridon Kollias, seeks damages for personal injuries he sustained — that he alleges he sustained caused by the unlawful acts of the defendants Bay Tankers Inc. and Kingsway Tankers Inc.

I have told you that before I can instruct you as to the law that applies you have to determine whether or not the plaintiff was a crew member and seaman aboard the TP Williamsburg or whether he was a maritime worker, a ship repairman, employed by D & G.

Now, let me try to put that in some kind of historical context for you. We really have to go back to the evolution of the law with respect to different persons involved with ships and how they have been treated by the law.

There is a whole body of law, Federal law, which has evolved over the years that deals with seamen, members [877] of the crew, and that deal with what the obligations are of a shipowner with respect to a crew member. Occasionally, ships receive other services from other persons. A clear example of that would be when a ship enters a dry dock or another ship repair facility and while it is in that facility welders come aboard who work for the shipyard and do ship repairs. Those persons are covered by a different body of law and different concepts. There is something called the Longshoremen and Harbor Workers Act.

Now, a shipowner has a degree of responsibility to such persons but it is of a different

nature. It is of a different quality than that which is the obligation of a shipowner towards its crew. In other words, what I am saying is that the answer to the question whether the plaintiff was a seaman and member of the crew or whether he was a ship repairman and not a member of the crew does not tell us whether the shipowner has any responsibility, any liability towards him with respect to this accident, but what it does tell us, as you will hear later, which body of law we invoke.

So that the first question which you have to determine is whether the plaintiff was a seaman or a member of the crew employed by the defendants or whether he was a maritime worker, a ship repairman employed by D & G design incorporated.

[878] I told you that we had the two groups of two bodies. We had the seamen, members of the crew, and we had the welders in the shipyard and that they were governed by two different bodies of law, and in some instances it is clear. Somebody who was an able bodied seaman and he is given a mop and he's told to swab the deck and to do other things of that sort is clearly recognizable as being a crew member. The welder in the shipyard is clearly recognizable as being not a seaman but a ship repairer. And in many cases it is clear what category a particular individual is in. We know that the deck hand is a member of the crew and we know the welder is not.

Ships produce income for their owners only when they are going back and forth. When the ship is tied up and idle, it is not producing income. For that reason, the practice has evolved where

a ship required repairs which could not be accomplished by the crew regularly assigned to the vessel an alternative developed to the requirement that the ship go into a dry dock or tie up in the port and that is when the ship could be safely operated while the repair was going on, instead of tying up in the port or in the dry dock, the ship was permitted to operate to go back and forth and instead of the various repairmen working on the ship in a dry dock or in port they went aboard the vessel and they became what is known as riding crew.

[879] Now, so that you begin to have a blending, a coming together of these two different classifications, the seaman aboard the ship who is a member of the crew and the ship repairman, who is an employee of the shipyard, who is doing his particular craft aboard the ship, but instead of being in one place, the ship is moving around while this happens. And the question then which you have to decide is whether Mr. Kollias was aboard that ship as a seaman, member of the crew employed by the defendants or whether he was aboard that vessel as a maritime worker, a machinist, employed by D & G Design Incorporated.

Now, I think the term seaman doesn't need to be defined. A ship repairman — which is the defendant's contention that plaintiff was not a crew member or a seaman but he was a ship repairman — and ship repairman is defined as somebody who performs ship repairs and I'm sure that helps you a lot. Ship repairs are defined broadly as being a conversion, alteration, cleaning, maintenance work aboard a vessel. That is the general definition of ship repairs.

Relevant Portions of Charge

Now, coming then more specifically to the contentions in this case having given you that background.

The plaintiff contends that he was a member of the crew of the TP Williamsburg serving aboard that vessel for purposes of making repairs, aiding in the general [880] maintenance of the ship and its purpose and its mission. The plaintiff contends that although he was directly paid by D & G Marine Service he was directly supervised by officers or the other members of the Williamsburg's crew in performing numerous tasks related to the every day operations of the ship, some of which are traditionally the work of the ship's crew.

The defendant, by contrast, contends that the plaintiff was a maritime repairman, directly employed by D & G Marine, which was contracted by the defendant shipowner to perform specific repairs aboard the ship.

Now, the fact that the plaintiff was aboard the Williamsburg at the time of his accident does not in and of itself make him a crew member. In other words, as I have explained to you, the custom developed that the persons who would not be members of the crew would go aboard the vessel, as for example, ship repairmen, and the vessel would be under way. So that the mere fact that the plaintiff was aboard the vessel and the vessel went from port to port does not in and of itself make him a member of the crew. It is a circumstance which you can consider and give such weight as you think appropriate. It is not in and of itself dispositive of the issue. His mere presence aboard the ship does not make him a crew member.

Relevant Portions of Charge

The defendant contends that the plaintiff's [881] presence aboard the ship was simply an expected incident to the job of one who performs repairs aboard ships.

According to the defendants, the plaintiff's sole role on this ship was to perform ship repair jobs unrelated to the navigation of the vessel. Now, by navigation, I mean in the broad sense the operation of the vessel, the functioning of the vessel. According to the defendant, the plaintiff was not involved in the every day operation of the vessel.

In order to determine whether the plaintiff was a seaman and crew member aboard the Williamsburg, or a repairman employed by D & G Marine, you must ask yourself what his function was, his purpose for being aboard the vessel. Was he there primarily to perform specific repairs unrelated to the maintenance and navigation of the vessel as the defendants contend? Or was he there as a member of the ship's crew to do whatever the officers of the ship determined, participating in the day-to-day maintenance and navigation functions of other seamen?

In order to find that the plaintiff was a member of the crew of the Williamsburg, you must find that his work was performed on that vessel and that the work he performed contributed to the functions of the vessel, the navigation of the vessel, the accomplishment of its mission or to the operation or welfare of the vessel in terms of [882] its maintenance.

The fact that an individual does not live permanently aboard a vessel does not mean that he cannot become a member of the crew.

Relevant Portions of Charge

You know there is a dispute in the testimony with respect to whether or not the plaintiff signed ship's articles. That is not dispositive. In other words, if you find that the plaintiff has not signed ship's articles, it does not mean that he is not a member of the ship's crew.

I am trying to explain that the decision that you are called upon to make is one which is not determined by any single factor alone, that you have to look to the overall nature of the relationship which existed, considering all of these factors to determine what the plaintiff's status was aboard the Williamsburg.

It is also not essential to his becoming a crew member that the plaintiff be permanently assigned to the vessel. He may have duties which require him to serve on numerous vessels and you may still find that he is a member of the crew of the particular vessel involved in the case.

On the other hand, however, there must be more than an irregular or transient connection between the plaintiff, the vessel and the vessel owner in order to find that the plaintiff is a member of the crew for purposes of this action.

[883] A maritime repairman does not become a member of the ship's crew merely because he is performing his job aboard a ship at the time of the accident. Large numbers of longshoremen, repair workers and other maintenance personnel are involved in maritime employment without having a significant enough relationship with a particular ship over a period of time to be considered a member of the crew.

Relevant Portions of Charge

I believe I already told you that the location of the ship at the time of the accident is also not a determining factor with respect to plaintiff's status. A person can be a ship repairman or be a seaman regardless of whether the ship is then at sea or in port.

Whether on the facts of this case Mr. Kollias had a more or less permanent connection with the Williamsburg at the time of the accident and was aboard the vessel primarily to aid in its navigation or its proper functioning in maintenance, contributing to the mission of the vessel or whether he was a maritime repairman who was on board the vessel at the time of the accident is an incidental and necessary aspect of his employment which is the fact question which you must determine.

The plaintiff has the burden of proof on this issue. He claims he was a crew member and is entitled to the greater protection the law extends to such person. [884] Thus, the plaintiff must prove to you by a fair preponderance of the credible evidence that he was a crew member and seaman aboard the Williamsburg.

If the plaintiff has not met his burden or if the evidence is imbalanced on this point, then you must find that the plaintiff is a maritime repairman.

You will be given a special verdict form and the first question that it asks is: "We the jury find that the plaintiff Spyridon Kollias' status aboard the Williamsburg was that of, (A) a seaman and a member of the crew."

That is what the plaintiff contends he was. That is the issue with respect to which he has the burden of proof.

Relevant Portions of Charge

Or: "(B) A maritime repairman, not a member of the crew."

That is the defendant's contention.

You are going to be asked a second question at this stage of the proceedings. That is, you must also determine whether or not the defendants in this action, Bay Tankers and Kingsway Tankers served as the plaintiff's employer and that an employer-employee relationship was established between the defendant and the plaintiff.

Now, in making this determination, you should consider who exercised primary control over Mr. Kollias' activities? That is, you should consider whether the [885] defendant shipowner in this action assumed enough of the incidents of an employer such as the rights to control and supervise the plaintiff's work as to be deemed the plaintiff's employer.

In this regard the plaintiff contends that despite the fact that he was engaged to go aboard the Williamsburg and directly paid by D & G that he was a borrowed servant, that is, that he was on loan to the defendant who decided what work would be done, what hours he would work, how his work was to be performed. Moreover, he notes that all the tools for his work were provided by the defendant.

As a result, the plaintiff argues that the defendant shipowner exercised primary control over his work and, therefore, should be considered to be his employer.

The significance of this, and as I will explain at a later phase of the case, is that it then

determines the appropriate body of law to be invoked.

The defendant argues, on the other hand, that the plaintiff's work was performed primarily under the direction and control of D & G Marine, a company that hired him and paid his wages. Mr. Kollias was, according to the defendant, just one of a number of employees of D & G who were assigned in this instance to perform the repair work aboard the Williamsburg but his direction and control [886] remained with D & G. Defendant argues that D & G hired the plaintiff, had the power to fire him and paid his wages.

In determining who had primary control over the direction and supervision of plaintiff's work, you should adopt a common sense flexible approach. You may consider the following factors:

Who had control over the plaintiff and the work he is performing beyond the mere suggestion of details or cooperation?

Was this a case of cooperation between the plaintiff and other officers and crew of the ship? Or was this an instance of plaintiff's subordination to other crew members and officers?

You may consider in this regard the distinction between authoritative direction and control and mere suggestions as to details. Was there an agreement or unstated understanding between D & G Marine and the shipowner as to who would direct and supervise the plaintiff in his employment activities? Who furnished the tools in place of persons? What was the duration of plaintiff's employment aboard the vessel? Who had the right to discharge the employee? Who has to pay the employee?

Relevant Portions of Charge

These criteria are not exclusive but merely suggestive of the factors you should consider in [887] determining the plaintiff's employment status.

If you find that plaintiff was primarily under the direction and control of the defendant shipowner and that the shipowner assumed the attributes of an employer, then you would find that the defendant was plaintiff's employer for purposes of this action.

I said defendant, I mean defendants. There are two, as you know, Bay Tankers and Kingsway Tankers, and if i have used the singular with respect to defendant, please understand that there are two defendants.

The plaintiff contends that he was an employee of the defendants and the plaintiff has the burden of proof on that issue.

If you find, as the defendant's contend, that the plaiatiff was primarily directed and supervised by D & G Marine and that D & G was his primary employer, then you will find that the defendants were not the plaintiff's employer. That's the second question that you will find on your special verdict form.

"We the jury find that at the time of the accident the plaintiff was (A) an employee of defendants Bay Tankers Inc. and/or Kingsway Tankers Inc. (B) an employee of D & G Marine and not of defendants.

The first 2(A) is the plaintiff's contention and 2(B) is the defendant's contention.